MOTION FILED
FEB 8 - 2010

(2)

No. 09-700

IN THE

Supreme Court of the United States

HOMAIDAN AL-TURKI,

Petitioner,

v.

COLORADO,

Respondent.

On Petition for a Writ of Certiorari
to the Colorado Court of Appeals

MOTION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF AND BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND THE COLORADO CRIMINAL DEFENSE BAR AS *AMICI CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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MOTION OF *AMICI CURIAE* FOR LEAVE TO FILE BRIEF IN SUPPORT OF PETITIONER

Amici curiae, the National Association of Criminal Defense Lawyers and the Colorado Criminal Defense Bar, respectfully move for leave of Court to file the accompanying brief under Rule 37.2(b). *Amici* timely notified both parties of their intention to file a brief. Petitioner has consented to the filing of an *amici curiae* brief; Respondent has withheld consent. Both parties' written responses are on file with the Court.

Amici and their respective members are committed professionally and personally to protecting the rights of the criminally accused. Among the pantheon of rights afforded criminal defendants under our Constitution, the right to a fair trial before an impartial jury is, perhaps, the most sacrosanct.

Contrary to this Court's teachings in *Ristaino v. Ross*, 424 U.S. 589 (1976), and *Ham v. South Carolina*, 409 U.S. 524 (1973), Colorado law dispenses with the need for probing *voir dire* of prospective jurors who have conveyed a constitutionally significant, or invidious, prejudice, absent a "clear" or "unequivocal" expression of bias on the part of the juror. In so doing, the State of Colorado has run afoul of minimal federal constitutional requirements.

Amici and their membership have a deep and abiding interest in ensuring that state jury selection procedures comport with federal constitutional standards, and therefore respectfully request that the Court grant leave to file this brief.

Respectfully submitted,

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BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND THE COLORADO CRIMINAL DEFENSE BAR AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONER

INTRODUCTION AND INTEREST OF THE *AMICI CURIAE*[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a professional bar association committed to the mission of securing justice and due process for persons accused of crime or other misconduct. Founded in 1958, NACDL currently represents more than 12,800 direct members – and 94 state, local, and international affiliate organizations with another 35,000 members – including private criminal defense lawyers, public defenders, United States military defense counsel, law professors, and judges.

The Colorado Criminal Defense Bar ("CCDB") is a statewide professional association of attorneys, investigators, and paralegals dedicated to representing persons accused of crime. Founded in 1979 by a committed few, CCDB now claims approximately 1000 active members. CCDB is affiliated and aligned with NACDL, in mission, function, and goals.

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part, and that no person, other than *amici* and their counsel, made a monetary contribution to its preparation or submission. Consistent with Rule 37.3, counsel of record for both parties were timely-notified of *amici*'s intent to file a brief in support.

Amici regularly advocate for, and defend, the rights of the criminally accused in both state and federal courts. *Amici* and their respective members have a strong interest in protecting and advancing the rights of criminal defendants, and a particular interest in safeguarding the right to trial by an impartial jury, which lies at the heart of due process. *E.g., Irvin v. Dowd,* 366 U.S. 717, 721-22 (1961). As practitioners who appear regularly in state and federal courts on behalf of those accused of criminal misconduct, the members of NACDL and CCDB have a special interest in promoting and maintaining the overall fairness and impartiality of criminal proceedings.

State jury selection procedures that restrict a criminal defendant's ability to probe prospective jurors, through questioning, for invidious bias or prejudice strike at the core of the Sixth and Fourteenth Amendments' collective guarantee of "a fair trial by a panel of impartial, 'indifferent' jurors[.]" *Turner v. Louisiana*, 379 U.S. 466, 471 (1965) (citation omitted). Colorado state courts, in contravention of this Court's prior pronouncements in *Ham v. South Carolina*, 409 U.S. 524 (1973), *Ristaino v. Ross*, 424 U.S. 589 (1976), and subsequent cases, have held that there is no entitlement to probe a prospective juror for prejudice – even invidious prejudice – absent a "clear" or "unequivocal" expression of bias on the part of the juror.

Amici are gravely concerned that Colorado's impermissibly restrictive, and ultimately misguided, approach to juror questioning has impaired (and will continue to impair) the fundamental fairness of criminal trials conducted throughout that state. More broadly, *amici* and their membership fear that, absent intervention from this Court, other states might be inclined to similarly limit the ability of criminal

defendants to probe prospective jurors for invidious bias and prejudice. Finally, *amici* are troubled any time a state refuses to adhere to, or otherwise ignores, Supreme Court precedent establishing baseline constitutional requirements related to the conduct of criminal trials.

As Justice Douglas aptly observed, "[e]rosions of constitutional guarantees usually start slowly, not in dramatic onsets." *Cupp v. Murphy*, 412 U.S. 291, 304 (1973) (dissenting in part). *Amici*'s interest in Mr. Al-Turki's case is that it illustrates, in rather stark terms, how the incremental erosion of bedrock federal constitutional principles at the state-level can lead to monumental collapses in the fairness and impartiality of criminal proceedings. When state jury selection procedures fail to comport with federal constitutional standards, the overall fairness of criminal trials is inevitably undermined. As professional organizations whose membership have demonstrated a long-standing commitment to defending the rights of the criminally accused, *amici* have a unique and lasting interest in seeing that the United States Constitution's promise of a fair trial before an impartial jury is fully-realized.

SUMMARY

This case concerns a criminal defendant's elemental right to be tried by an impartial jury, as guaranteed by the Sixth Amendment to the Constitution of the United States, and as applicable to the states through the Fourteenth Amendment to the Constitution.

In 2006, a Colorado jury convicted Petitioner, a Saudi national and a Muslim, of unlawful sexual contact, extortion, false imprisonment, conspiracy to commit false imprisonment, and theft. The charges in question arose from Petitioner's purported exploitation of a live-in female housekeeper from Indonesia.

Petitioner is currently serving an indeterminate sentence of twenty-eight years to life in the Colorado Department of Corrections.

This was a highly-publicized prosecution that intersected sensitive issues of ethnicity, religion, and nationality. As the trial court was preparing to swear in the petit jury, a juror felt compelled to alert the court that he held certain views about Islam, and adherents to the Muslim faith, that might impair his ability to be fair and impartial.[2] The trial court refused to excuse the juror, and furthermore declined to allow additional questioning of the juror to probe his expressions of possible bias or prejudice. The court ultimately seated the juror over Petitioner's repeated objections. Playing upon some of the very concerns expressed by this juror, the prosecution repeatedly injected Islamic culture and putative Muslim practices into the trial proceedings.

The Colorado Court of Appeals, relying primarily on language culled from *Carrillo v. People*, 974 P.2d 478, 488 (Colo. 1999), affirmed the trial court's decision to seat the juror without allowing further inquiry into the juror's expression of possible bias. Pet. App. 16a. The court of appeals reasoned that, absent a "clear" or "unequivocal" expression of bias or prejudice on the part of the juror, the trial court retained the

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[2] More specifically, the juror expressed the view that Muslims believed "the laws of God are higher than the laws of man," and even went so far as to assert that "notwithstanding the facts presented, if it came to a situation where it was a he said, she said issue, my bias may be altered based on the belief [Petitioner] would be obeying religion versus law." Pet. App. 13-14a.

discretionary authority to preclude additional questioning. *Id.*

This Court, in a line of cases stretching from *Ham v. South Carolina*, 409 U.S. 524, 527 (1973), to *Rosales-Lopez v. United States*, 451 U.S. 182, 189-90 (1981), and beyond, consistently has held that trial courts must allow criminal defendants to probe prospective jurors for bias whenever there exists a "significant likelihood" that racial or similarly invidious prejudices might hinder the juror's ability to sit fairly and impartially. This unbroken line of authority has failed to penetrate Colorado law: no reported Colorado case acknowledges this Court's adoption of the "significant likelihood" of bias test, and, indeed, there is scant mention of *Ham* or any of its progeny in state appellate cases reported in the thirty-seven years since *Ham's* decision.

The refusal on the part of Colorado courts to acknowledge, much less heed, Supreme Court precedent in this area has led to the development of state jury selection procedures that fall short of federal constitutional requirements. Colorado's unwillingness to embrace the "significant likelihood" of bias test, or to adopt even less restrictive standards for allowing criminal defendants to probe potentially invidious prejudices, has placed it outside the national mainstream.

Petitioner's case is illustrative of how constitutionally deficient jury selection procedures can fatally undermine the Sixth and Fourteenth Amendments' collective promise of a fair trial before an impartial jury. In a criminal prosecution suffused with religious and ethnic overtones, a juror who expressed genuine concerns about his ability to render a fair and impartial verdict, due to certain preconceptions about Petitioner's religious faith, was nevertheless allowed to

sit on the jury, without any inquiry into his expressions of potential bias. Because Colorado law barters in absolutes by requiring "clear" or "unequivocal" expressions of bias, a prospective juror who indicates a potential – or even a probable – invidious bias may nonetheless be permitted sit on a jury, without any additional inquiry whatsoever.

Accordingly, *amici* respectfully request that the Court intervene in this case and grant the petition for a writ of certiorari.

REASONS FOR GRANTING THE WRIT

"'A fair trial in a fair tribunal is a basic requirement of due process.' [...] In the ultimate analysis, only the jury can strip a man of his liberty or his life. [Therefore], a juror must be as 'indifferent as he stands unsworne.'" *Irvin v. Dowd*, 366 U.S. 717, 722 (1961) (citations omitted). The United States Constitution's basic assurance of a fair trial before an impartial jury is under threat. Colorado's studious avoidance of this Court's precedent has led to the development of jury selection practices that are unmoored from federal constitutional mandates and that are out of step with jury selection practices nationwide. Intervention by this Court is required to draw Colorado back into the constitutional fold.

1. COLORADO'S ANOMALOUS "CLEAR" OR "UNEQUIVOCAL" EXPRESSION OF BIAS STANDARD IS THE PRODUCT OF CARELESSNESS AND A COMPLETE DISREGARD FOR THIS COURT'S PRIOR PRONOUNCEMENTS.

There is not a single reported case in Colorado acknowledging this Court's repeated admonition that, when there exists "a constitutionally significant likelihood" that racial or other invidious prejudices might affect a juror's ability to sit impartially, a criminal defendant must be permitted to probe the juror for bias or prejudice through additional questioning. *E.g.*, *Ristaino v. Ross*, 424 U.S. 589, 596-97 (1976) (discussing *Ham v. South Carolina*, 409 U.S. 524, 527 (1973)); *accord Turner v. Murphy*, 476 U.S. 28, 33 (1986) (plurality opinion); *Rosales-Lopez v. United States*, 451 U.S. 182, 189-90 (1981). Indeed, in the wake of this Court's decision in *Ham* nearly four decades ago, only two published, Colorado cases have referenced *Ham* and its progeny (and, even then, only in passing).[3] *See People v. Harlan*, 8 P.3d 448, 461-62 (Colo. 2000) (citing *Ham*, *Rosales-Lopez*, and *Turner* for certain generic principles); *Fields v. People*, 732 P.2d 1145, 1160 (Colo. 1987) (Vollack, J., dissenting) (citing *Ristaino* for proposition that proportional representation on juries not necessary to ensure impartiality).

Although *Ham*, *Ristaino*, and subsequent cases have been virtual strangers to Colorado law, it is only in the last decade that the state has deviated so markedly from the constitutional baselines established by these

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[3] One other case, *Chiappe v. State Personnel Board*, 622 P.2d 527, 531 n.6 (Colo. 1981), cites to Justice Douglas's dissent in *Ham* for a proposition unrelated to jury selection.

cases. For instance, in both *People v. Nailor*, 200 Colo. 30, 32, 612 P. 2d 79, 80 (1980), and *Morgan v. People*, 624 P.2d 1331, 1332 (Colo. 1981), the Colorado Supreme Court endorsed the view that a prospective juror should not only be subject to further scrutiny, but, in most instances, excused, when his or her fairness or impartiality "appears doubtful." However, *Nailor* went further and concluded that the juror's expressed "doubts" in that case not only suggested bias, but, in fact, amounted to "a clear expression of bias" warranting the juror's dismissal. 200 Colo. at 32, 612 P. 2d at 80. In so doing, *Nailor* arguably sowed the seeds that would lead to the development of the heightened "clear" and "unequivocal" expression of bias standard.

Nearly two decades after its opinion in *Nailor*, the Colorado Supreme Court decided *Carrillo v. People*, 974 P.2d 478 (Colo. 1999). One of the issues before the court in *Carrillo* was whether a prospective juror, who both admitted to a personal relationship with the victim's father and expressed doubts about his ability to be fair and impartial, should have been excused for cause. 974 P.2d at 486. Alluding to its prior decision in *Nailor*, the supreme court opined that the defendant's challenge to the prospective juror was properly denied, because his expressions of possible bias "appear[ed] ambiguous and fail[ed] to articulate *a clear expression of bias* requiring his dismissal." *Id.* at 488 (emphasis added). Thus, with the stroke of a pen, the supreme court transformed a seemingly benign, parenthetical observation in *Nailor* into a legal standard that severely restricts the ability of criminal defendants to ferret out invidious prejudice among prospective jurors.

Since *Carrillo*, Colorado courts have applied the "clear" or "unequivocal" expression of bias standard in a number of reported cases, with varying results.

Compare People v. Wilson, 114 P.3d 19, 25 (Colo. App. 2004) (finding "unequivocal" expression of bias), and *People v. Luman*, 994 P.2d 432, 436 (Colo. App. 1999) (same) *with People v. Young*, 16 P.3d 821, 826 (Colo. 2001) (finding no "clear" expression of bias), and *Harlan*, 8 P.3d at 464 (finding expressions of bias merely "equivocating"). As evidenced by both these cases, and Petitioner's case, this standard is uniquely susceptible to uneven application. The disparate outcomes arrived at in these cases strongly suggest that the standard is both impracticable and inequitable.

The Colorado standard is impracticable for the simple reason that it defies common-sense. Any judge or experienced practitioner can attest that "determinations of juror bias cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism." *Wainwright v. Witt*, 469 U.S. 412, 424 (1985). That is precisely why this Court has never required that juror bias be proved with "unmistakable clarity." *Id.* Expressions of invidious bias will often be muted or veiled. Only the most ignorant – or those most eager to avoid jury service altogether – are likely to stand before a court of law and readily admit an inability to be fair and impartial based on considerations of race, religion or ethnicity.

The challenge in crafting jury selection procedures that give effect to the constitutional imperative of a fair trial before an impartial jury lies not in identifying those jurors with clear or obvious biases, but rather in rooting out the much murkier impulses and beliefs that sometimes underlie suggestions of invidious bias. The "clear" or "unequivocal" bias standard repeatedly has proven itself incapable of meeting this challenge. If Colorado law is not up to the task of confronting juror bias in its most pernicious form, the law is irretrievably broken. What *Ham* and its progeny recognize, and what

Colorado law ignores, is that the greatest threat to the promise of a fair trial is not the obviously-biased juror, but the juror who has expressed potentially invidious biases that are left unexplored.

The Colorado standard is also inherently inequitable. Criminal prosecutions that implicate issues of race, religion, or national origin also tend to surface potentially invidious biases on the part of jurors. Yet, because such biases are commonly intimated or implied (when they are expressed at all), the "clear" or "unequivocal" bias standard rarely will be met. The practical effect of Colorado's impossibly high standard is that, in those cases where invidious prejudice has the greatest potential to impact the fairness of the proceedings, the ability to probe jurors for such bias is often at its most limited.

Over the course of nearly four decades, this Court has made abundantly clear that when there exists "a constitutionally significant likelihood" that racial or other invidious prejudices might affect a juror's ability to sit impartially, a criminal defendant must be permitted to probe the juror for bias or prejudice through additional questioning. *E.g.*, *Ristaino*, 424 U.S. at 596-97. The State of Colorado, as it did in Petitioner's case, has steadfastly refused to heed this admonition.

2. COLORADO'S REFUSAL TO ACKNOWLEDGE THE "SIGNIFICANT LIKELIHOOD" OF BIAS TEST, OR TO ADOPT EVEN LESS RESTRICTIVE STANDARDS FOR ALLOWING CRIMINAL DEFENDANTS TO PROBE POTENTIALLY INVIDIOUS PREJUDICES, HAS PLACED IT OUTSIDE THE NATIONAL MAINSTREAM.

Numerous courts nationwide have affirmed the importance of allowing adequate inquiry into the potential biases of prospective jurors. *See, e.g, State v. Barnes*, 547 A.2d 584, 587 (Conn. App. 1988); *State v. Thomas* 798 A.2d 566, 537 (Md. App. 2002); *People v. Tyburski*, 518 N.W.2d 441, 447-49 (Mich. 1994); *State v. Clark*, 981 S.W.2d 143, 147 (Mo. 1998).

And, unlike Colorado, a number of states have expressly recognized the applicability of the "significant likelihood" of bias test fashioned by this Court. *See People v. Wilborn*, 82 Cal.Rptr.2d 583, 586-87 (Cal. App.- 2d Dist. 1999); *Mitchell v. State*, 335 S.E.2d 150, 151-52 (Ga. App. 1985); *State v. Altergott*, 559 P.2d 728, 732-33 (Haw. 1977); *People v. Peeples*, 616 N.E.2d 294, 311 (Ill. 1993); *State v. Roy*, 681 So.2d 1230, 1240-41 & n.9 (La. 1996); *Hernandez v. State*, 742 A.2d 952, 956 (Md. 1999); *Commonwealth v. Grace*, 352 N.E.2d 175, 181 (Mass. 1976); *People v. Harrell*, 247 N.W.2d 829, 831 (Mich. 1976); *Commonwealth v. Christian*, 389 A.2d 545, 547 n.5 (Pa. 1978); *State v. Cason*, 454 S.E.2d 888, 890 (S.C. 1995); *Reynolds v. Commonwealth*, 367 S.E.2d 176, 180 (Va. App. 1988); *State v. Davis*, 10 P.3d 977, 997 (Wash. 2000).

Finally, the American Bar Association Principles for Jury Trials ("ABA Principles") reflect a growing consensus that inquiries into potential bias on the part of prospective jurors should be liberally allowed. *See* ABA Principles, Principle 11.B.4 (adopted 2005) ("Where there is reason to believe that jurors have been

previously exposed to information about the case or for other reasons are likely to have preconceptions concerning it, the parties should be given liberal opportunity to question jurors individually about the existence and extent of their knowledge and preconceptions.").

The foregoing illustrates that Colorado's restrictive approach to probing potentially invidious bias in jurors is out of step with mainstream practices. This deviation from national and constitutional norms has consequences. The legitimacy of our criminal justice system rises or falls on its perceived fairness and impartiality. When a juror insinuates that his or her verdict might be driven by some impermissible animus toward the defendant, and that juror is allowed to sit without any further inquiry, the basic fairness and impartiality of the proceedings are necessarily open to question. Colorado's approach needlessly invites such questions and, in so doing, undermines the legitimacy or our criminal processes.

CONCLUSION

For the above reasons, *amici* respectfully request that the petition for a writ of certiorari be granted.

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February 8, 2010